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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.769 OF 2005

Sardar Hasanbhai Attar ...Appellant.

Vs.

Usman Papamiya Attar Shaikh & Ors. ...Respondents.

Mr. S.S.Kulkarni with Mr. Sachin Chavan for the appellant.

Mr. R.M.Haridas i/by Mr. P.N.Joshi for the respondents.

CORAM : ANOOP V. MOHTA,J.

DATED : 3rd October, 2007

JUDGMENT :-

1. The present Second Appeal is against the order dated 4th May, 2005 passed by the Additional District Judge, Niphad (Nashik) in Regular Civil Appeal No. 258 of 2005, whereby the appeal arising out of the order below Exh. 29 in Regular Darkhast No. 41 of 2001 filed in the Court of Civil Judge, Junior Division, Yeola dated 10/03/2005 has been maintained. Respondent No.1 is the decree holder in Regular Civil Suit No. 10 of 1982 by judgment and decree dated 04/09/1995. In appeal No. 139 of 1999, the same decree was confirmed on 25/09/2000. Therefore, execution of the same decree came to be filed on 03/07/2001 by the decree holder against respondent

Nos. 2A and 3 (Exh. 29).

2. The warrant under Order 21 Rule 35 of the Civil Procedure Code (for short, "CPC") for possession was issued. One Sardar Attar as third party obstructed and therefore, the warrant was returned unserved.

3. Meanwhile, the appellant who is one of the co-sharer of the suit property pending the appeal No. 139 of 1999 as referred above, has filed special suit No. 104 of 2000 in the Court of Civil Judge, Senior Division, Niphad for separate possession. The same is still pending. Another suit No. 51 of 1999 also filed by one Mr. Bashir Haji Abdul Attar for partition of the property mentioned in scheduled "A" of the Regular Darkhast No. 41 of 2000 in question. Both these suits are pending in the respective courts. There was no written partition between the co-owners and basically by the appellant. The property in question has been in possession of the plaintiff as the owner. However, based on the alleged family arrangement, the Courts held that there was partition and the suit property has been in possession of the plaintiff as owner. Present respondent No.1, decree holder, therefore, had filed suit for possession

against respondent Nos. 2A and 2B (Original defendants).

4. The suit property is an ancestral property of deceased Fattubhai Attar having three sons, Papamiya, Haji and Hasan. The appellant is the son of Hasan, therefore, has, as alleged, Joint share in the suit property. In suit No. 10/1982, Hasan and his heirs were not made party. The suit was decided in their absence. The appellant, therefore, obstructed the execution petition by appearing suo-motu and raising objections. By impugned order dated 10/03/2005 rejected the said application, by the executing Court. The same has been confirmed by the impugned judgment by the first appellate Court.

5. The appellate Court held that the appellant is not entitled to raise such objection to the execution of the decree under Order 21 Rule 97 to 101 and therefore, refused to interfere with the order of the executing courts.

6. The learned counsel appearing for the appellant strongly relied on **(2003) 12 SCC 219 (Ashan Devi Vs. Phulwasi Devi)** Para 6, 19 to 22 and 27 & **P.**

Janardhana Rao Vs. Kannan (2004) 11 SCC 511 para 8,9, 10 and also on **Shreenath Vs. Rajesh (1998) 4 SCC 543 para 10.**

7. The relevant order 21 Rule 97 of the CPC is reproduced as under:-

> 97. **Resistance or obstruction to possession of immovable property-**
>
> (1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.
>
> (2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.)
>
> **Emphasis added.**

8. The trial Court has dismissed the appellant's application without framing the issue and or giving any opportunity to lead the evidence in support of the application as raised, by order dated 10/03/2004 holding that the decree holder is a Senior Citizen about 70 years and the third party i.e. appellant has no right in the suit property; he filed this application only to protect the proceedings; and further that the appellant, failed to bring any order

from the Civil Judge, Senior Division, Niphad in which his suit No. 104/2000 has been pending.

9. The first appellate Court by framing the only issue about the entitlement of the appellant under Order 21 Rule 97 to 101 rejected the first appeal, mainly on the ground that the party who resisted the execution has to prima-facie make out his rights in the suit property and observed that the possession appears to be the necessary ingredients of Rule 97 relying on **Jamuna Prasad Sah Vs. Sashi Mahto, Jharkhand High Court 2003 (1) CCC page 359 and further 1999(2) BCJ 124 Supreme Court.**

10. The question of laws are as under:-

1. Whether the lower Courts have erred in law in holding that as the property is not in possession of the appellant and therefore, the application under Order 21 Rule 97 of the CPC is not maintainable? - Yes.

2. Whether the impugned orders are perverse? - Yes.

11. First of all, as there is no dispute about the

fact that the appellant is also heir of Hasan who is the son of Fattubhai and further that the suit property was originally owned by the said Fattubhai the pendency of the suit filed by the appellant in reference to the said property is also not in dispute. The appellant is person interested and as they were not made party in the suit, decree of which sought to be executed by the application. Therefore, without deciding this issue and without giving opportunity to lead evidence on these issue both the courts rejected the application as filed by the applicant wrongly. There is no need as recorded by the appellate Court in Order 21 Rule 97 to 103 that the person in possession and the person dispossesses is only entitled to file such application to obstruct the execution of the decree for possession. The order 21 Rule 97 to 103 is a complete Code. The remedy to have their grievances redressed is only by adjudicating finally in execution proceeding itself. The third party who is resisting and or obstructing the execution of decree can also seek adjudication of his claim and rights by making an application to avoid multiplicity of the proceedings. This provisions have been incorporated Section 47 of the CPC also supports the same. Therefore, the executing Court need to adjudicate the inter-se claims

of decree holder and the third party in the execution proceedings itself, to avoid prolongation of litigation by drawing parties to file independent suit (vide) **Ashan Devi (Supra).** The Apex Court in **T. Janardan Rao (Supra)** in para 9 is observed as under:-

> . "8. Thus, the scheme of the Code clearly adumbrates that when an application has been made under Order 21 Rule 97, the court is enjoined to adjudicate upon the right, title and interest claimed in the property arising between the parties to a proceeding or between the decree-holder and the person claiming independent right, title or interest in the immovable property and an order in that behalf be made. The determination shall be conclusive between the parties as if it was a decree subject to right of appeal and not a matter to be agitated by a separate suit. In other words, no other proceedings were allowed to be taken. It has to be remembered that preceding Civil Procedure Code (Amendment) Act, 1976, right of suit under Order 21 Rule 103 of 1908 Code was available which has been now taken away. By necessary implication, the legislature relegated the parties to an adjudication of right, title or interest in the immovable property under execution and finality has been accorded to it. Thus, the scheme of the Code appears to be to put an end to the protraction of the execution and to shorten the litigation between the parties or persons claiming right, title and interest in the immovable property in execution. "

12. The Supreme Court in **Shrinath (Supra)** while

considering Order 21, Rule 97 in para 10 has observed as under (extract)

> . "We find the expression "any person" under sub-clause (1) is used deliberately for widening the scope of power so that the executing court could adjudicate the claim made in any such application under Order 21 Rule 97. Thus by the use of the words "any person" it includes all persons resisting the delivery of possession, claiming right in the property, even those not bound by the decree, including tenants or other persons claiming right on their own, including a stranger."

13. Therefore, considering the scheme of the above provisions and the decisions of the Supreme Court, the appellant being a person who has right in the immovable property in question is entitled to be heard in the matter on merit. The rejection of this application by the trial Court without giving any opportunity and further by the appellate Court by confirming the said application on the ground of not being in possession of the property in question while moving the application for resistance or obstruction is incorrect and unsustainable. It is wrong to observed that a person who is not in possession cannot obstruct or resist the delivery of possession of immovable property in the execution application filed

by the decree holder.

14. The appellant has a right in the property and, therefore, though may not be in a possession of the same property. His suit for possession as well as the partition is pending. The rejection of the present application in such fashion is not correct. The present application as filed by the appellant is maintainable.

15. In view of this, the second appeal is allowed as the impugned order passed by the Courts below is perverse and contrary to law. The impugned orders dated 04/05/2005 and 10/03/2005 are quashed and set aside. The questions are answered accordingly.

16. The trial Court, Civil Judge, Junior Division, Yeola, to hear this Exh. 21 in Regular Darkhast No. 41 of 2001 and disposed of the objections and the application of the appellant, preferably within six months, after giving opportunity to the parties in accordance with law

17. The second appeal is allowed, accordingly.

18. No costs.

(ANOOP V. MOHTA, J.)